Mohd Noor bin Yunus & Ors v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL REVISION NO 43–16 OF 1999
ABDUL WAHAB J
22 JULY 1999

Criminal Procedure *— Revision — Stay of execution pending appeal — Sentence with respect to imprisonment stayed — Offenders unable to pay fine — Whether stay of execution of fine should be allowed — Whether necessary to remit case to trial court to exercise its discretion — Criminal Procedure Code s 311*

Criminal Procedure *— Sentence — Imprisonment in default of fine — Whether alternatives must be considered before imprisonment is carried out — Criminal Procedure Code s 283(i)(b)(4)*

Criminal Procedure *— Sentence — Stay of execution pending appeal — Offenders to serve term of imprisonment for failure to pay fine — Whether court should allow application to stay execution of fine — Criminal Procedure Code ss 283(i)(b)(4) & 311*

The offenders have been convicted after a trial in the magistrate's court on two charges under ss 27(4)/27(8) and ss 27(5)/27(8) of the Police Act 1967 and have been sentenced to a term of imprisonment and a fine. The offenders have filed an appeal against their conviction and sentence, and applied for a stay of execution of the sentence. The learned magistrate granted a stay of the sentence of imprisonment only. As the offenders were unable to pay their fine and would have serve the term of imprisonment in default, they have made this application to the judge of the High Court to revise the order of a stay of execution of the fine under s 311 Criminal Procedure Code ('the CPC').

Held, granting the stay for the payment of fine:

(1) The proviso to s 283(i)(b)(4) makes it clear that where no time has been allowed for payment of the fine, imprisonment in default of the fine is only to be carried out if it appears to the court that such person has no property or insufficient property to satisfy the fine payable or that the levy of distress will be more injurious to him or his family than imprisonment. In other words, if a person is unable to pay a fine, he must be brought back before the court and alternatives must first be considered by the court before he may be sent to prison in the first instance for default of payment of the fine. If time is given to pay the fine, or the fine is to be realized by levy or distress, the court may require the offender to execute a bond (see p 202C–E).

(2) Without an application being made or being informed that the offender is not in a position to pay the fine, the court cannot give time for payment, and when a fine is not paid when no time for

payment has been applied for, then the court cannot but conclude that the offender could pay but chooses not to pay. Where the person chooses not to pay, he cannot but must be imprisoned for default (see p 203A–B).

(3) The judicious exercise of the discretion under s 311 requires that the court must consider whether in its view the appeal is frivolous and vexatious, the conviction and sentence is plain and obvious, and the application is therefore an abuse of the process. If so, it must refuse the application for a stay. The failure to apply for time or to pay by instalments in this case has resulted in the proviso to s 283(i)(b)(4) not having been complied with, and the offenders have been in prison custody for one day. Taking that into account and since the stay in respect of their sentence of imprisonment has been stayed by the trial court, the court in the exceptional circumstance stay the sentence of the payment of the fine pending appeal instead of sending the case back to the magistrate to avoid further detention of the offenders (see p 203E–H).

[Bahasa Malaysia summary

Pesalah-pesalah telah disabitkan selepas perbicaraan di mahkamah magistret di atas dua tuduhan di bawah ss 27(4)/27(8) dan ss 27(5)/27(8) Akta Polis 1967 dan juga dihukum untuk tempoh pemenjaraan dan juga denda. Pesalah-pesalah telah memfailkan rayuan terhadap sabitan dan hukuman mereka, dan memohon untuk penggantungan pelaksanaan hukuman tersebut. Majistret yang arif telah membenarkan penggantungan hukuman penjara tersebut sahaja. Oleh kerana pesalah-pesalah tidak dapat membayar denda dan akan dipenjarakan jika ingkar membayar, mereka telah membuat permohonan ini kepada hakim Mahkamah Tinggi untuk mengubah perintah penggantungan pelaksanaan denda tersebut di bawah s 311 Kanun Acara Jenayah ('KAJ').

Diputuskan, membenarkan penggantungan pembayaran denda tersebut:

(1) Proviso kepada s 283(i)(b)(4) menunjukkan dengan jelas bahawa jika tiada masa diberikan utnuk pembayaran denda, pemenjaraan kerana ingkar membayar denda hanya dilaksanakan jika mahkamah berpendapat bahawa beliau tiada harta atau tidak mempunyai harta yang mencukupi untuk memuaskan denda yang kena dibayar atau distres levi akan lebih menyukarkannya atau keluarganya daripada pemenjaraan. Dalam lain perkataan, jika seseorang tidak dapat membayar denda, beliau mesti dibawa balik di hadapan mahkamah dan alternatif-alternatif mestilah dipertimbangkan oleh mahkamah sebelum beliau boleh dihantar ke penjara untuk keingkaran membayar denda. Jika masa diberi untuk membayar denda, atau denda akan dipuaskan dengan levi

A atau distres, mahkamah boleh memerlukan pesalah tersebut untuk melaksanakan bon (lihat ms 202C–E).

(2) Tanpa permohonan dibuat atau diberitahu bahawa pesalah bukanlah dalam kedudukan untuk membayar denda, mahkamah tidak boleh membenarkan masa untuk membayar, dan bila denda tidak dibayar apabila tiada permohonan untuk tempoh masa membayar, mahkamah tiada pilihan melainkan untuk menyimpulkan bahawa pesalah boleh membayar tetapi memilih untuk tidak membayar. Apabila seseorang memilih untuk tidak membayar, beliau mestilah dipenjarakan untuk keingkaran tersebut (lihat ms 203A–B).

(3) Pelaksanaan budi bicara kehakiman di bawah s 311 memerlukan mahkamah mempertimbangkan sama ada, di dalam pandangannya, rayuan tersebut adalah remeh dan menyusahkan, sabitan dan hukuman tersebut adalah jelas dan ketara, dan permohonan tersebut adalah penyalahgunaan proses. Jika benar, ia mestilah enggan membenarkan permohonan tersebut untuk suatu penggantungan. Kegagalan untuk memohon tempoh masa atau membayar secara ansuran di dalam kes ini telah menyebabkan proviso s 283(i)(b)(4) tidak dipatuhi, dan pesalah-pesalah telah dipenjarakan sehari. Dengan mengambil kira perkara tersebut dan oleh kerana penggantungan berkenaan dengan hukuman penjara telah digantungkan oleh mahkamah perbicaraan, mahkamah di dalam kes luar biasa ini menggantungkan hukuman membayar denda sehingga rayuan daripada menghantar kes tersebut balik kepada majistret untuk mengelak penahanan selanjutnya pesalah-pesalah tersebut (lihat ms 203E–H).]

Notes

For cases on imprisonment in default of fine, see 8 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2775–2781.

For cases on revision, see 8 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2374–2421.

For a case on stay of execution pending appeal, see 8 *Mallal's Digest* (4th Ed, 1997 Reissue) para 3008.

Cases referred to

PP v Tan Yook Kee and another action [1939] MLJ 159 (FMS) (refd)
Sin Yong Chang v PP [1948–49] MLJ Supp 125 (refd)

Legislation referred to

Criminal Procedure Code ss 283(i)(b), 283(i)(b)(4), 311
Criminal Procedure Code s 389 [India]
Police Act 1967 ss 27(4), (5), (8)

Haji Sulaiman Abdullah (*Ambiga Sreenevasan, Charles Hector, Stanley Sinappan* and *R Sivarasa* with him) (Legal Aid Bureau, Bar Council) for the appellants. A

Abang Iskandar bin Abang Hashim (Deputy Public Prosecutor) for the respondent.

Abdul Wahab J: The offenders together with others have been convicted after a trial in the magistrate's court on two charges under ss 27(4)/27(8) and ss 27(5)/27(8) of the Police Act 1967 and have been sentenced to a term of imprisonment and a fine. These persons, including the offenders have filed an appeal against their conviction and sentence, and applied for a stay of execution of the sentence. The learned magistrate granted a stay of the sentence of imprisonment only. B C

The two charges against them are as follows:

> Pertuduhan Pindaan:
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> Bahawa kamu pada 17 Oktober 1998 antara jam 9.30 malam hingga 10.30 malam, di kawasan persimpangan Jln Raja dengan Jalan Lebuh Pasar, dalam Bandaraya Kuala Lumpur, di dalam Wilayah Persekutuan Kuala Lumpur sebagai anggota satu perhimpunan haram (unlawful assembly) telah mengingkari perintah untuk bersurai yang di berikan oleh Penolong Kanan Pesuruhjaya Polis II Zainal Abidin Bin Ali, Ketua Polis Daerah Dang Wangi, Kuala Lumpur, oleh yang demikian kamu telah melakukan satu kesalahan di bawah s 27(4) Akta Polis 1967 (Akta 344) yang boleh di hukum di bawah s 27(8) Akta yang sama. D E
>
> Pertuduhan Pilihan Pindaan:
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> Bahawa kamu pada 17 Oktober 1998 antara jam 9.30 malam hingga 10.30 malam, di kawasan persimpangan Jln Raja dengan Jln Lebuh Pasar, dalam Bandaraya Kuala Lumpur, di dalam Wilayah Persekutuan Kuala Lumpur telah dijumpai di satu perhimpunan haram (unlawful assembly), oleh yang demikian kamu telah melakukan satu kesalahan di bawah s 27(5) Akta Polis 1967 (Akta 344) yang boleh di hukum di bawah s 27(8) Akta yang sama. F

Mohd Noor Bin Yunus (the first offender) and Baharom Bin Md Nor (third offender) were fined RM3,000 in default three months imprisonment whereas Mazlan Bin Mat Hassan (second offender) was fined RM2,500 in default two months imprisonment. Their imprisonment sentences, which were stayed, were for a term of three months. G

The offenders were unable to pay their fine and would have serve the term of imprisonment in default. Thus they have made this application to the judge of the High Court to revise the order of a stay of execution of the fine under s 311 Criminal Procedure Code ('the CPC'). H

Section 311 CPC states as follows:

> Except in the case of a sentence of whipping (the execution of which shall be stayed pending appeal), no appeal shall operate as a stay of execution, but the Court below or a Judge may stay execution on any judgment order, conviction or sentence pending appeal, on such terms as to security for the payment of any money or the performance or non-performance of any act or the suffering of any punishment ordered by or in such judgment order, conviction or sentence as to the Court below or to such Judge may seem reasonable. I

The accepted rule of practice generally is that in relation to applications for a stay of execution under s 311 CPC is that while a stay would be granted in respect of the term of imprisonment, a sentence of a fine would have to be paid. *Sin Yong Chang v PP* [1948–49] MLJ Supp 125 does not support the proposition that there can be no stay for a fine. That case decided the point where the sentence is a fine, and the fine has been paid, the question of bail pending appeal does not arise. The case was cited only on this point and no further in *Criminal Procedure in Malaysia* by Mimi Kamariah Majid (2nd Ed). This practice is essentially based on the reasoning that a fine could be refunded, while the clock could not be turned back where there has been a loss of liberty (refer *Mallal's Criminal Procedure* (5th Ed, 1999) at p 4907).

However, the above reasoning holds true only in the case where the convicted person is able to pay the fine. In fact the others charged together with the offenders were able to raise the money to pay their fines, and have been able to secure their liberty pending disposal of their appeal except for the three offenders.

Before I proceed any further, it is necessary to consider the specific legislation relating to payment of a fine. This is contained in s 283(i)(b) of the Code:

> Provision as to sentences of fine
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> (i) Where any fine is imposed under the authority of any law for the time being in force, then, in the absence of any express provision relating to such fine in such law contained, the provisions following shall apply (that is to say) —
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> (a) where no sum is expressed to which the fine may extend the amount to which the offender is liable is unlimited, but shall not be excessive;
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> (b) in every case of an offence in which the offender is sentenced to pay a fine the Court passing the sentence may, in its discretion, do all or any of the following things:
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> (1) allow time for the payment of the fine;
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> (2) direct payment of the fine to be made by instalments;
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> (3) issue a warrant for the levy of the amount by distress and sale of any property belonging to the offender;
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> (4) direct that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may be sentenced or to which he may be liable under a commutation of sentence:
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> Provided that where time is not allowed for the payment of such fine an order for imprisonment in default of payment shall not be issued in the first instance unless it appears to the Court that such person has no property or insufficient property to satisfy the fine payable or that the levy of distress will be more injurious to him or his family than imprisonment;

The proviso at the end of s 283(i)(b)(4) provides clearly that where time for payment has not been given, as occurs in this case, an order for

imprisonment in default shall not be issued at the first instance unless it appears to the court that such person has no property or insufficient property to satisfy the fine payable or that the levy of distress will be more injurious to him or his family than imprisonment. Thus in practice, a person may not be sent to prison in default of paying a fine unless he is first brought back to the court which will hear as to whether he has or has not sufficient property to satisfy the fine, or that the levy of distress is going to be more injurious to him or his family than imprisoning him.

Reference to the practice under the Indian Criminal Procedure Code is of little assistance since the corresponding s 389 is differently worded. The structure of the section envisages that ordinarily after a sentence of fine has been passed, the person sentenced may apply for time to pay the fine or to pay by instalments. If time is not allowed by the court, then the court must proceed to consider issuing a warrant for the levy of the amount by distress and sale of any property belonging to the offender. The proviso to s 283(i)(b)(4) makes it clear that where no time has been allowed for payment of the fine, imprisonment in default of the fine is only to be carried out if it appears to the court that such person has no property or insufficient property to satisfy the fine payable or that the levy of distress will be more injurious to him or his family than imprisonment. In other words, if a person is unable to pay a fine, he must be brought back before the court and the alternatives must first be considered by the court before he may be sent to prison in the first instance for default of payment of the fine. If time is given to pay the fine, or the fine is to be realised by levy or distress, the court may require the offender to execute a bond.

The following case may serve as an illustration. In *PP v Tan Yook Kee and another action* [1939] MLJ 159 (FMS) two prisoners were confined to prison for defaulting a sentence of fine. The learned magistrate directed the prisoners to be produced before him and released them from custody on the execution of a 'bond to pay the fines by instalment,' in one case and 'pending realisation of the fine' in the other. Upon revision by the judge it was held that there was nothing illegal in what the magistrate had done. The reasons given are of more direct interest. At p 159, Cussen J stated that:

> The provisions of s 283(i)(b) are not part of the sentence but alternative methods of enforcing the sentence as is evident from the words used ie 'the Court passing the sentence may ... .'
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> I agree with the deputy legal adviser that the magistrate, who imposes the sentence of fine, is not 'functus officio' there and then, and can exercise any of the powers given by s 283(i)(f) at any appropriate time until the fine is paid or levied.
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> I think that it is in the interests largely of the persons sentenced that this should be so; as the provisions of that section (283(i)(b)) are obviously framed to enable the court to give any consideration to what is in the best interests of the person sentenced eg the first proviso to s 283(i)(b)(4).

In this case, the section was not complied with because no one has applied to the magistrate for time to pay the fine, or to pay it by instalments, or told the magistrate the three offenders were unable to pay the fine. Any of these

three applications would have brought the offenders back before the magistrate before the offenders are imprisoned for default. Being a matter uniquely within the knowledge of the offender, these are matters that ought to be brought to the court's attention by the offender, or his counsel. Without an application being made or being informed the offender is not in a position to pay the fine, the court cannot give time for payment, and when a fine is not paid when no time for payment has been applied for, then the court cannot but conclude that the offender could pay but chooses not to pay. Where the person chooses not to pay he cannot but must be imprisoned for default.

Returning to the subject of a stay of execution, s 311 specifically states that an appeal shall not operate as a stay of execution. It is left to the discretion of the court. At first instance it is at the discretion of the trial court. Superficially it would appear that a court having convicted an offender, would be unlikely to grant a stay of execution of the sentence. In actual fact, in the great preponderance of cases, the courts have granted a stay, mainly of sentences of imprisonment. In most cases, no reasons have been recorded for the grant of the stay. One is left with the distinct conclusion that the court is concerned to avoid the impression it is affected by the fact it has convicted the offender, and at the same time is expressing its humble deference to the appellate court. Such a lenient, indulgent or easygoing approach lays open the discretion under s 311 to exploitation and abuse of the process convicted offenders who choose to delay their just punishment. In many cases the opportunity was taken to abscond. The judicious exercise of the discretion under s 311 requires that the court must consider whether in its view the appeal is frivolous and vexatious, the conviction and sentence is plain and obvious, and the application is therefore an abuse of the process. If so, it must refuse the application for a stay.

The failure to apply for time or to pay by instalments in this case has resulted in the proviso to s 283(i)(b)(4) not having been complied with, and the offenders have been in prison custody for one day, perhaps needlessly. Taking that into account and since the stay in respect of their sentence of imprisonment has been stayed by the trial court, I would in this exceptional circumstance stay the sentence of the payment of the fine pending appeal instead of sending this case back to the magistrate to avoid further detention of the offenders.

Order accordingly.

Reported by Benjamin Yong